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in the
Supreme Court
of the
United States
OCTOBER TERM, 1973

No. 72-1635

THE OHIO CASUALTY GROUP,
Petitioner,

vs.

JAMES C. PARRISH, et al.,
Respondents.

BRIEF OF PARRISH RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment below of the District Court of Appeal of Florida, Third District.*

*Since the Florida Supreme Court denied review, certiorari, if issued by this Court, would be directed to the intermediate appellate court, the Third District Court of Appeal. *E.g., Conner v. Butler*, 361 U.S. 29. The record references in this brief refer to the record in the Third District Court of Appeal and are given in the event that petitioner elects to have the record transmitted under Rule 21.

OPINIONS BELOW

The decision of the District Court of Appeal of Florida, Third District, is reported at 260 So.2d 550 and is reproduced at pages 6-7 of the Appendix to the Petition. The order of the Supreme Court of Florida denying certiorari, dated January 22, 1973, is unreported and reproduced at page 5 of the Appendix to the Petition. The order of the Supreme Court of Florida, dated March 7, 1973, denying the petition for rehearing is also unreported and is reproduced at page 4 of the Appendix to the Petition.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The order of the Supreme Court of Florida denying certiorari was rendered on March 7, 1973, when the petition for rehearing was denied. Accordingly, the judgment of the Third District Court of Appeal did not become final until March 7, 1973.

QUESTIONS PRESENTED

Petitioner claims that the questions presented are as follows:

> "WHETHER PETITIONER INSURANCE CARRIER WAS DEPRIVED OF THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS BY LACK OF A TIMELY AND PROPER NOTICE OF THE CONFERENCE AT WHICH PETITIONER'S RIGHTS TO EQUITABLE PRORATION OF THE SETTLEMENT AMOUNT WERE CONSIDERED?

WHETHER THE HEARING PROCEDURE MET THE STANDARDS OF DUE PROCESS IN THAT NO WITNESSES WERE PRESENTED, NO EVIDENCE TAKEN AND DUE TO THE COURT'S DECIDING OF ALL ISSUES BASED SOLELY ON THE ARGUMENT OF COUNSEL?

WHETHER THE GUARANTEE OF DUE PROCESS OF LAW WAS VIOLATED BY THE ABSENCE OF SUBJECT MATTER JURISDICTION?"

Respondent contends that the record of the cause is such that none of the questions petitioner seeks to raise are presented by the record or properly before the Court.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 7, 1970, the minor respondent James C. Parrish, Jr., sustained severe personal injuries in a Florida intersection accident. (R. 27-31).

TRIAL COURT PROCEEDINGS

On September 25, 1970, suit was brought on the minor's behalf in the Dade County Circuit Court to recover for such injuries (R. 1-3) which rendered him "a complete quadriplegic" (R. 13). After extensive discovery and numerous pretrial conferences (R. 66-93, 111-173, 179-198, 200-219) the case was specially set for trial on August 23, 1971.

On the eve of trial and after respondents' counsel felt that a serious liability problem had developed, the defendants offered $1,695,000 to settle the case (R. 298). To facilitate the settlement, respondents' counsel agreed to reduce their fee (R. 293, 309) and the only thing standing in the way of the settlement was to work out an acceptable payback with the minor respondent's workmen's compensation carrier, the petitioner, which had a lien on any settlement proceeds. With this objective in mind, counsel for the parties appeared before the trial judge on the Friday before trial was to start (R. 279-325).

When the parties first met before the trial judge, an informal discussion ensued regarding possible settlement of the comp lien (R. 281-289). It soon become apparent that respondents' counsel could not agree on a payback figure with Mr. Kuvin, trial counsel for the petitioner. At this juncture, the question arose as to whether the

parties would go forward with an equitable proration hearing under F.S.A. 440.39 so the trial court could resolve the matter. Counsel for the petitioner objected because respondents' counsel was about to testify as an expert as to the value of the case assuming admitted liability and petitioner's counsel had not had a chance to explore the matter with other experts (R. 295). Respondents' counsel met the objection by offering to withdraw the proposed expert testimony—**at which point trial counsel for the petitioner accepted the offer and agreed to continue with the hearing** (R. 295-296).

Since the petition is bottomed on the false premise that petitioner's rights were determined over its objection and without notice or opportunity to be heard, we wish to dwell on the portions of the record which refute this claim. At page 295 of the record, respondents' trial counsel was called as a witness and asked if he had any opinion as to what the case was worth if it was a case of admitted liability. Mr. Kuvin, petitioner's trial counsel, objected and the following occurred:

> "MR. KUVIN: Your Honor, I would object to that.
>
> Mr. Headly is the plaintiffs' attorney, obviously, and therefore I do not think that his opinion would be a valid opinion.
>
> THE COURT: Overruled.
>
> Go ahead. I accept that it is an attorney's opinion.

MR. KUVIN: Let me ask one thing further.

Are we now formally having a pro rata distribution here? That is what I want to know about it.

Is that the Court's ruling?

THE WITNESS: I do not see how we get out of it. We are looking Monday morning in the eye.

THE COURT: Do you have any objection?

MR. KUVIN: I would object, because if you are going to use the formula that is set forth in the book you now have before you, and testimony is to be taken of Mr. Headly, I have not been given any opportunity of determining from, for instance, Mr. Adams or Mr. Pyszka, or some other defense attorney or some other attorney.

For instance, if you are going to use Joe Headley's testimony as to what he thinks the value of the lawsuit is, I have no counter-testimony. I have been given no opportunity.

THE COURT: Do you want Mr. Adams to give an opinion?

MR. KUVIN: I have not conferred with him, and I do not know what his opinion is.

I do not think that is fair to this carrier, who is looking down the throat of a half a million dollars.

MR. DANIELS: Is your objection to proceeding the same as we withdraw the offer in his testimony?

> Are you going to go forward if I do not ask him for an opinion?
>
> MR. KUVIN: **I will go forward, yes, because my carrier, frankly, would like to know what is facing us as far as what the Court's going to rule on."** (R. 294-296).

With all parties before the trial court and with all of the parties having requested and agreed to a determination of their rights, the trial court heard the evidence and ordered respondents to pay $20,000.00 of the settlement proceeds to petitioner in satisfaction of its compensation lien.

Petitioner's claim that no evidence was taken at the agreed hearing does not comport with the record. At page 292 of the record, the parties stipulated that in making the equitable proration the trial court could consider the entire court file "including all exhibits". On the next page of the transcript (R. 293), petitioner's counsel likewise stipulated that respondents' counsel had reduced their contract fee of 40% to a third "to effectuate the settlement" and had incurred costs of some $30,000.00.

The case was settled for $1,695,000.00 (R. 297-298, 326-327). It was stipulated that petitioner had paid $70,000.00 in past comp benefits (R. 318). As to possible future benefits, petitioner's counsel offered the summary statement of counsel for one of the defendants, Mr. Adams, as to what the discovery depositions showed and expected trial testimony would be regarding the minor respondent's life expectancy and cost of medical maintenance (R. 318-319, 303-306). Some of the doctors believed

the boy would live only four or five years or even less (R. 304). Other doctors thought that, assuming he got over his present problems, he could live for 15-25 years (R. 304). These experts likewise estimated his annual medical maintenance costs at from $16,000-$20,000.00.

The only area in which evidence was not presented concerned opinion evidence as to what respondents' total damages were. Such evidence was not offered because petitioner's counsel objected that he could not get a witness for same on such short notice and did not think such evidence was proper anyway (R. 296, 317-318).

Finally, the presentation of evidence concluded when petitioner's counsel announced that he had no further evidence which he wished to offer. The record in this regard reads as follows:

> "MR. DANIELS: Do you have anything else you want to offer in the way of evidence?
>
> MR. KUVIN: **No, other than Mr. Adams' statement as to what the future will bring. . . .**" (R. 318).

After hearing all of the evidence that anyone cared to present and after hearing extensive argument on the issues, the trial court ruled that $20,000.00 should be paid back to the petitioner (R. 323-324). After this ruling, the case was settled and on the following Monday the order of equitable proration affirmed below was entered which provides:

> "THIS CAUSE having been settled by and between the parties and an equitable proration

hearing been held under F.S.A. 440.39, and the Court having considered the evidence and the arguments of the parties, it is hereby,

ORDERED that THE OHIO CASUALTY GROUP, a foreign corporation, have and recover the sum of Twenty Thousand ($20,000.00) Dollars from plaintiffs, . . ." (R. 326).

APPELLATE PROCEEDINGS BELOW

On appeal to the District Court of Appeal of Florida, Third District, the equitable proration order was affirmed, the court saying:

"These consolidated appeals are from the same order of equitable proration which apportioned the amount of a personal injury settlement agreement pursuant to Fla.Stat. §440.39 F.S.A. The appellant is the workmen's compensation carrier for the injured minor appellee.

Three points are argued. The first urges that the order must be reversed because the procedure followed in the trial court was improper. We agree that the procedure was not in accord with the statute and the case law concerning the subject; nevertheless, we hold that no reversible error has been demonstrated since the appellant participated without objection in the conference, which served as a substitute for the prescribed hearing. Appellant stipulated with appellees to submit the matter to the trial judge without formal proceedings. Appellees substantially

changed their positions in reliance upon appellant's apparent agreement to that procedure. Appellant is now estopped to change its position simply because it is dissatisfied with the result. See Jones v. Life Insurance Company of Florida, Fla.App. 1968, 215 So.2d 889; Walker v. Narose Bldgs., Inc., Fla.App. 1968, 206 So.2d 400.

Appellant's second and third points essentially question the amount of the apportionment. No error is shown. See Hardware Mutual Insurance Company v. Roth, Fla.App. 1969, 222 So.2d 768." 260 So.2d 550-551.

Thereafter, petitioner unsuccessfully sought review in the Supreme Court of Florida.

RAISING FEDERAL QUESTIONS BELOW

Petitioner admits at page 10 of its Petition that no federal questions were raised in the trial court. While petitioner attempted to raise due process claims for the first time on appeal, the Third District Court of Appeal's opinion does not decide, consider or even mention petitioner's belated due process claims or any other federal question.

REASONS FOR DENYING THE WRIT

1. No federal question was properly raised or decided below. The case of **Walker v. Narose Bldgs., Inc.**, (Fla.App. 1968), 206 So.2d 400, cited below, holds that under the Florida law matters "agreed to at trial" cannot be "raised for the first time on appeal". Florida also holds

that "Constitutional issues, other than those constituting fundamental error, are waived unless they are timely raised" and cannot be raised for the first time on appeal. **Sanford v. Rubin** (Fla. 1970), 237 So.2d 134. As this Court said in **Williams v. Georgia,** 349 U.S. 375, 382-383, "A state procedural rule which forbids the raising of federal questions at late stages in the case or by any other than prescribed method, has been recognized as a valid exercise of state power."

2. The decision below of the Third District Court of Appeal only passes on Florida law questions regarding the doctrines of consent, waiver, estoppel and equitable proration.

3. The record shows that petitioner's procedural due process claims are without merit. It consented to the trial procedures followed, waived any rights to further notice, and its rights were determined after a full and complete record had been made containing all the evidence petitioner cared to offer. It is axiomatic that "the hearing required by due process is subject to waiver." **Boddie v. Connecticut,** 401 U.S. 371, 378-379.

4. Petitioner's claim that the trial court lacked jurisdiction over the subject matter involves nothing more than a state law question concerning jurisdiction of a state trial court. Moreover, while a personal injury settlement must be made before an order of equitable proration regarding the proceeds is entered under F.S.A. 440.39, the record shows that the settlement was made before the proration order was entered. The proration order commences by stating, "THIS CAUSE having been settled. . ." (R. 326).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the District Court of Appeal of Florida, Third District, should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Supreme Court Rule 33(1), three copies of the foregoing Brief have this ____ day of June, 1973, been served by mail on counsel for all parties in the cause as follows: JOHN R. BERANEK, ESQUIRE, of JONES, PAINE & FOSTER, P.A., P.O. Drawer E, West Palm Beach, Florida 33402; EDWARD A. PERSE, ESQUIRE, of HORTON & PERSE, 410 Concord Building, Miami, Florida 33130; PREDDY, HADDAD, KUTNER & HARDY, Fifth Floor, Concord Building, Miami, Florida 33130; and RICHARD B. ADAMS, ESQUIRE, of ADAMS, GEORGE & WOOD, Ninth Floor, Concord Building, Miami, Florida 33130.

SAM DANIELS